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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CITY OF NEWARK,

Petitioner,

v.

TOWNSHIP OF WEST MILFORD,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF OF RESPONDENT IN OPPOSITION

MARTIN F. MURPHY
Counsel of Record

JOHNSON, JOHNSON & MURPHY
A Professional Corporation
Counselors-at-Law
401 Wanaque Avenue
Pompton Lakes, New Jersey 07442
(201) 835-0100

Attorneys for Respondent, Township of West Milford

Adams Press Corp., 50 Park Place, Newark, New Jersey 07102—(201) 623-8611

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
REASON FOR DENYING WRIT OF CERTIORARI	4
CONCLUSION	9

PAGE

Table of Authorities

Cases Cited

A.M.G. Associates v. Springfield Tp., 65 N.J. 101 (1974) 7

Agins v. City of Tiburon, 477 U.S. 255 (1980) 5

So. Burlington Cty. N.A.A.C.P. v. Tp. of Mount Laurel, 67 N.J. 151 (1975), *app. dism.* and *cert. den.* 423 U.S. 808 (1975) (Mount Laurel I) 3

So. Burlington Cty. N.A.A.C.P. v. Tp. of Mount Laurel, 92 N.J. 158 (1983) (Mount Laurel II) 3, 6

Usdin v. State, Dept. of Environmental Protection, 173 N.J. Super. 311 ..... 4, 7

Washington Market Enterprises, Inc. v. City of Trenon, 68 N.J. 107 (1975) 4

Statutes Cited

N.J.S.A. 40:55D-2 5

N.J.S.A. 58:10-23.11a 8

N.J.S.A. 58:10A-2 8

N.J.S.A. 58:11A-2 8

N.J.S.A. 58:12A-1 8

Other Authority Cited

State Development Guide Plan, New Jersey Department of Community Affairs, Division of State and Regional Planning (Revised Draft—May, 1980) .. 8

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Statement of the Case

What the City of Newark failed to state in its Petition, is that its lands in the Township of West Milford have been used almost exclusively by it since the turn of the century as a watershed for the collection and storage of potable water for a major portion of the City's water supply. Through its ownership of 85 per cent of this

drainage basin known as the Pequannock Watershed (which represents 35 per cent of the land area of West Milford), the City of Newark has been able to provide a high quality water with minimal treatment to more than 600,000 people in northern New Jersey.

Nearly the entirety of the watershed has been zoned for large lots since the inception of zoning in the Township of West Milford. The lands owned by the City of Newark are presently zoned R-4 which permits one residential unit for each four acres, in addition to the other following uses:

1. Farms
2. Detached dwelling units
3. Public playgrounds, conservation areas, parks and public purpose uses
4. Churches
5. Public and private day schools of elementary and/or high school grade, not operated for profit
6. Private Active and Passive recreational facilities in the "R-4" only
7. Residential Clusters in portion of the "R-1" "R-2" and "R-3" Districts, as indicated on the Zoning Map in accordance with the provisions specified in Section 18-14 of this Ordinance
8. Water Supply Systems in the "R-4" District only.

Because of the Township of West Milford's difficult topography, lack of sewers, and unique service as a watershed area for the collection of a potable water supply, approximately 74 per cent of the entire land area of the Township has been zoned R-4.

The present litigation started when the Township of West Milford rejected the City of Newark's plan to develop nearly 10 per cent of the Pequannock Watershed. The Development Plan, which included a mixture of multi-family residential, commercial, and industrial uses, would have necessitated the introduction of a major sewer system in the watershed to service the contemplated 5,280 dwelling units. The impact of the Development Plan would have nearly doubled the number of residential dwelling units in the Township of West Milford.

The Trial Court found that the Township of West Milford's zoning ordinance did not provide for its fair share of the regional need for low and moderate income or least cost housing pursuant to *So. Burlington Cty. N.A.A.C.P.* v. *Tp. of Mount Laurel,* 67 N.J. 151 (1975), *app. dism.* and *cert. den.* 423 U.S. 808 (1975) (*Mount Laurel I*). In addition, the Trial Court found the R-4 zoning of the City of Newark's watershed property to be arbitrary, discriminatory and confiscatory (P21a), despite the fact that the City of Newark was only complaining about the zoning of 10 per cent of its holdings, and was satisfied to have the balance of their properties remain zoned R-4 (Transcript November 24, 1980, p. 72, l. 8 to 22; p. 73, l. 14 to 19) (Transcript October 30, 1979, p. 106 l. 12 to p. 107, l. 6).

While awaiting a decision by the Appellate Division of the Superior Court of New Jersey, *So. Burlington Cty. N.A.A.C.P.* v. *Tp. of Mount Laurel,* 92 N.J. 158 (1983) (*Mount Laurel II*) was decided by the New Jersey Supreme Court. Based upon that determination the Appellate Division reversed the Trial Court and remanded the question of the Township of West Milford's housing obligation. With regard to the R-4 zoning question, the Appellate Court held that there had not been a taking without just com-

pensation and affirmed the Trial Court's denial of monetary damages (P6a).

Thereafter, the New Jersey Supreme Court denied the City of Newark's Petition for Certification and dismissed its appeal.

Reason for Denying Writ of Certiorari

The Petition for Certiorari should be denied because it does not set forth a reason for a review by this Court. The Trial Court, Appellate Court and Supreme Court of New Jersey have all denied the City of Newark's claim for damages for the alleged taking of their property.

When the Trial Court stated that the R-4 zoning was arbitrary, discriminatory and confiscatory, it meant that the zoning precluded "economic use of such property" (P21a) for residential purposes. It never meant to conclude that the zoning of the City of Newark's property amounted to inverse condemnation or confiscation. To the contrary, the Court cited *Usdin* v. *State, Dept. of Environmental Protection,* 173 N.J. Super. 311 at 321 (Law Div. 1980), for the proposition that "compensation was not required by a municipal zoning provision even though it deprived the owner of the property's most beneficial use" (P11a).

As set forth in the leading New Jersey case on the theory of inverse condemnation, *Washington Market Enterprises, Inc.* v. *City of Trenton,* 68 N.J. 107 (1975), there must be a finding that the municipal action had the effect of:

> ". . . depriving an owner of undeveloped land of *all beneficial use* of that land for a significant period of time . . ." (Emphasis Added).

As stated in *Agins* v. *City of Tiburon,* 477 U.S. 255 (1980):

> "Although the ordinances limit development, they neither prevent the best use of appellant's land, . . . nor extinguish a fundamental attribute of ownership, . . ."

The zoning of the property in the *Agins* v. *City of Tiburon* case, *supra,* permitted residential development of between one to five single-family residences on the owner's five acre property, in addition to open space uses. This Court stated that:

> "In this case, the zoning ordinances substantially advance legitimate governmental goals. The State of California has determined that the development of local-open plans will discourage the 'premature and unnecessary conversion of open-space land to urban uses . . . The specific zoning regulations at issue are exercises of the city's police power to protect the residents of Tiburon from the ill-effects of urbanization. Such governmental purposes long have been recognized as legitimate . . ."

Such purposes also exist under the New Jersey Municipal Land Use Law, N.J.S.A. 40:55D-2, which provides that:

> "It is the intent and purpose of this act: . . .
>
> c. To provide adequate light, air and open space; . . .
>
> e. To promote the establishment of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities and regions and preservation of environment; . . .

> j. To promote the conservation of open space and valuable natural resources and to prevent urban sprawl an degradation of the environment through improper use of land; . . ."

The purpose of the R-4 zone as stated in the Township of West Milford Zoning Ordinance is that:

> "The 'R-4' District recognizes the existing physical constraints of the rugged topography and the limitations that the soil and geologic conditions present for adequate drainage and filtration of septic effluent. Limited development on large lots is the objective considering the practical unavailability of sewers, the remoteness from improved road access and the desire to continue the rural character of development still prevailing in these areas of the Township."

The New Jersey Supreme Court upheld the right of a municipality to zone for large lots and open areas in the *Mount Laurel II supra*, consolidated cases of *Glenview* v. *Franklin Townshp* (3 acre), and *Caputo* v. *Chester* (5 acre), and held that such zoning was not confiscatory, and would not constitute an illegal taking of property without just compensation.

The City of Newark has, and continues to use its watershed property for many of the uses permitted in the R-4 zone. Farming, which by definition includes forestry, is an activity that has been practiced on the City of Newark's property for many years (Transcript October 24, 1979, p. 102, l. 12 to 13; p. 103, l. 20 to 25); (Transcript October 31, 1979, p. 34, l. 13 to p. 35, l. 12). Although the City of Newark disputes the economic viability of this use (Transcript December 4, 1979, p. 96, l. 20 to 22), it is a use of the property permitted in the R-4 zone, and actively pursued by the landowner.

The R-4 zone also permits active and passive recreational facilities, which as defined by the Township of West Milford's Zoning Ordinance includes campgrounds, recreation and vacation facilities, golf courses and club houses. Some of these activities also exist as uses from which the City of Newark receives revenue (Transcript October 24, 1979, p. 104, l. 2 to 7); (Transcript October 31, 1979, p. 31, l. 24 to p. 32, l. 17).

Historically, the property owned by the City of Newark has been used as water supply lands for the collection and storage of potable water for use by nearly 600,000 citizens of the State of New Jersey (Transcript October 25, 1979, p. 139, l. 20 to p. 140, l .8). In addition to servicing its own residents with water, the City of Newark is in the business of selling water from this source to many other municipalities in the State (Transcript October 25, 1979, p. 139, l. 20 to p. 140, l. 8). The annual revenues received by the City of Newark for the sale of this water exceed the sum of eleven million dollars per year (Transcript October 31, 1979, p. 35, l. 19 to p. 36, l. 2). This specific economic use of the property is a use permitted in the R-4 zone, and one for which the property was acquired by the City of Newark nearly 100 years ago (Transcript October 25, 1979, p. 139, l. 20; p. 140, l. 8).

As stated in *Usdin* v. *State, Dept. of Environmental Protection, supra, containing a quote from A.M.G. Associates* v. *Springfield Tp.*, 65 N.J. 101 (1974):

> ". . . The approach to the taking problem and the result, may be different where vital ecological and environmental considerations of recent cognizance have brought about rather drastic land use restrictions in furtherance of a policy designed to protect important public interest wide in scope and territory; . . ."

Water supply and water supply lands are certainly a vital "ecological and environmental consideration" which warrant special attention. The State of New Jersey has expressed its concern for these considerations in the preamble of statutes which seek to protect water and water supply sources. N.J.S.A. 58:10-23.11a (Spill Compensation and Control Act); N.J.S.A. 58:11A-2 (Water Quality Planning Act); N.J.S.A. 58:12A-1 (Safe Drinking Water Act); N.J.S.A. 58:10-2 (Water Pollution Control Act).

The Township of West Milford, with one of the most mountainous terrains in the State of New Jersey, has been designated in the *State Development Guide Plan,* New Jersey Department of Community Affairs, Division of State and Regional Planning (Revised Draft—May, 1980), p. 87, p. 130, as a conservation area because of its sensitivity as a watershed area for a major water supply source.

It is perfectly clear after a recognition of these factors, why the Court did not award damages to the City of Newark. The City of Newark was never deprived of the use of its property through the government regulation of zoning by the Township of West Milford. The record does not support a basis for a review by the United States Supreme Court.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

MARTIN F. MURPHY
Counsel of Record

JOHNSON, JOHNSON & MURPHY
A Professional Corporation
Counselors-at-Law
401 Wanaque Avenue
Pompton Lakes, New Jersey 07442
(201) 835-0100

Attorneys for Respondent, Township of West Milford